

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GREG SKISTIMAS et al.,

Plaintiff,

v.

HOTWORX FRANCHISING LLC et al.,

Defendant.

CASE NO. 3:23-cv-05974-DGE

ORDER DENYING MOTION TO  
DISMISS (DKT. NO. 70) AND  
GRANTING MOTION TO  
COMPEL (DKT. NO. 87)

**I INTRODUCTION**

Before the Court is Defendants’ Motion to Dismiss (Dkt. No. 70) and Defendants’ Motion to Compel Compliance with Contractual Dispute Resolution Procedures (Dkt. No. 87) (“Motion to Compel”). Defendants assert both defenses for lack of personal jurisdiction and for failure to state a claim. *See* Fed. R. Civ. Pro. 12(b)(2); 12(b)(6); (*See* Dkt. No. 70 at 1–2.) The Court DENIES Defendant’s Motion to Dismiss for lack of personal jurisdiction. As for the Motion to Compel, the Court GRANTS the alternative relief requested and ORDERS the parties to arbitration. Finally, the Court STAYS this case pending arbitration.

## II BACKGROUND

Plaintiffs Greg and Gabriela Skistimas are individuals residing in Kitsap County, Washington. (Dkt. No. 32 at 2.) In December 2020, they agreed to open a franchise of HOTWORX, a “hot sauna” fitness studio. (*See* Dkt. No. 32 at 2–3). The Skistimas’ studio never opened, though they paid \$39,950 for the franchise. (*Id.* at 2). Defendant HOTWORX is a Wyoming limited liability company based in Louisiana. (*Id.* at 3.) The LLC’s members are citizens of Louisiana and Delaware. (Dkt. No. 21 at 1). Defendant Stephen P. Smith is the CEO of HOTWORX, Defendant Patricia Gattuso is a “Franchise Recruiter” at HOTWORX, and Defendant Nancy Price is likewise employed by HOTWORX in some capacity. (*See* Dkt. Nos. 32 at 18, 70 at 12.) All the individual defendants are citizens of Louisiana. (Dkt. No. 70 at 3.)

Plaintiffs initiated this suit in October 2023 and Defendants initially responded with a Motion to Dismiss certain defendants for lack of personal jurisdiction. (Dkt. Nos. 1, 22.) Plaintiffs then filed an amended complaint. (Dkt. No. 32.) Defendants filed a Motion to Compel Compliance with Contractual Dispute Resolution Procedures, and Plaintiffs filed a Cross Motion (Dkt. Nos. 44, 48.) This Court denied Defendants’ first Motion to Dismiss as moot and directed Defendants to respond to the amended complaint. (Dkt. No. 68.) Further, the Court struck the cross motions regarding dispute resolution procedures as duplicative, and instead directed the parties to consolidate their arguments. (*See* Dkt. 68.) The parties having now fully briefed both the Motion to Dismiss and Motion to Compel, the Court proceeds to consider the motions.

## III JURISDICTION

### A. Subject Matter Jurisdiction

First, the Court must assess whether it has subject matter jurisdiction under 28 U.S.C. § 1332. There is diversity of the parties, as Plaintiffs are citizens of Washington and Defendants

1 are citizens of Louisiana, Wyoming, or Delaware. (*See* Dkt. Nos. 32 at 2–4; 33; 21.) To  
2 establish jurisdiction under 28 U.S.C. § 1332, the amount in controversy must also exceed  
3 \$75,000. That is a somewhat closer question (and one not raised by Defendants), but the Court  
4 finds Plaintiffs have satisfied their minimal burden to plead damages in excess of \$75,000. *See*  
5 *Gaus v. Miller, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“Normally, the burden is satisfied if the  
6 plaintiff claims a sum greater than the jurisdictional requirement.”). Plaintiffs state that they will  
7 seek damages “in an amount to proven at trial, but which Plaintiffs estimate are in excess of  
8 \$75,000.” (Dkt. No. 32 at 31.) Plaintiffs aver that they paid \$39,950 in franchise costs, and they  
9 borrowed that money from their retirement account, resulting in “more than \$15,000 in fees to  
10 [a] consultant and a bank” and “more than \$20,000 in taxes and penalties.” (*Id.* at 8.) Plaintiffs  
11 further allege that Defendants improperly debited an amount “which aggregated to  
12 approximately \$5,000” from their bank account, plus \$750 in “convention fees.” (*Id.* at 2.)  
13 Because the claimed damages exceed \$75,000, and Plaintiffs intend to seek additional damages  
14 at trial, the Court finds that the amount in controversy requirement of 28 U.S.C. § 1332 is  
15 satisfied.

#### 16 **B. Personal Jurisdiction**

17 Next, the Court analyzes personal jurisdiction as to each of the defendants. As an initial  
18 matter, Defendants request that individual Defendants Jessica Matherne, Jodie Mateu, and  
19 Melissa Ferguson be dismissed because they no longer appear in Plaintiff’s Amended Complaint,  
20 and alternatively because the court lacks jurisdiction over them. (*See* Dkt. Nos. 70 at 6; 32 at 3–  
21 4.) Plaintiff does not respond and does not appear to press any remaining claim against these  
22  
23  
24

1 individuals. (*See* Dkt. No. 80.) The Court thus considers the complaint to be voluntarily  
 2 dismissed against these defendants and does not analyze its jurisdiction as to them.<sup>1</sup>

3 For the remaining defendants, the Court proceeds with its analysis of personal  
 4 jurisdiction. Personal jurisdiction comes in two types: general and specific. General jurisdiction  
 5 is broader, and “[f]or an individual, the paradigm forum for the exercise of general jurisdiction is  
 6 the individual's domicile.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915,  
 7 924 (2011) (“Goodyear”). Defendants are not domiciled in Washington, and so Plaintiffs focus  
 8 their attention on specific jurisdiction. (*See* Dkt. No. 80 at 7.) Specific jurisdiction “depends on  
 9 an ‘affiliatio[n] between the forum and the underlying controversy,’ principally, activity or an  
 10 occurrence that takes place in the forum State and is therefore subject to the State's regulation.”  
 11 *Goodyear*, 564 U.S. at 919. The Ninth Circuit uses a three-prong test to analyze specific  
 12 jurisdiction:

13 (1) The non-resident defendant must *purposefully direct his activities* or  
 14 consummate some transaction with the forum or resident thereof; *or* perform  
 15 some act by which he *purposefully avails himself* of the privilege of conducting  
 16 activities in the forum, thereby invoking the benefits and protections of its laws;  
 17 (2) the claim must be one which arises out of or relates to the defendant's forum-  
 18 related activities; and (3) the exercise of jurisdiction must comport with fair play  
 19 and substantial justice, i.e. it must be reasonable.

18 *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1227–28 (9th Cir. 2011) (emphasis in  
 19 original). The plaintiff bears the burden on the first two prongs, and if they carry that burden, the  
 20 burden shifts to the defendant to make a “compelling case” that applying jurisdiction would be  
 21 unreasonable. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)). In  
 22 a diversity case such as this, the Court looks to “whether the assertion of jurisdiction satisfies

---

23 <sup>1</sup> The Court further notes that former-Defendants Matherne, Mateu, and Ferguson were  
 24 terminated from the docket as of March 12, 2024.

1 [Washington] state law as well as due process requirements.” *Sinatra v. Nat’l Enquirer, Inc.*,  
2 854 F.2d 1191, 1194 (9th Cir. 1988).

3 The type of claim is also relevant to the jurisdiction analysis. Here, Plaintiff alleges  
4 statutory, contract, and tort claims. (*See* Dkt. No. 32 at 22–29). For tort claims, courts use an  
5 effects-based test, under which jurisdiction is proper if the defendant “(1) commits an intentional  
6 act, (2) expressly aimed at the forum state, that (3) causes harm the defendant knew was likely to  
7 be suffered in the forum state.” *Burri L. PA v. Skurla*, 35 F.4th 1207, 1213 (9th Cir. 2022)  
8 (citing *Calder v. Jones*, 465 U.S. 783, 788–89). Under that test, jurisdiction may be proper  
9 “even if the defendant never set foot in the forum state, if the defendant's contacts with the forum  
10 state are out-of-state acts that had an effect in the forum.” *Id.*

11 Applying that law to the facts of this case, the Court finds that it possesses specific  
12 personal jurisdiction as to Defendants Gattuso, Price, and Smith.

13 i. Patricia Gattuso

14 As noted above, Patricia Gattuso is a “Franchise Recruiter” for HOTWORX. In  
15 Defendant’s own exhibits, she is described as the “Contact owner” for the Skistimas account.  
16 (*See* Dkt. No. 45 at 151–55). She sent an email to Gabriela Skistimas providing the Franchise  
17 Disclosure Document (“FDD”) that is the subject of this dispute. (*See id.* at 155.) The parties  
18 disagree as to the extent of her contacts with Plaintiffs, but all agree she played a role in the  
19 franchise transaction. Plaintiffs allege that Gattuso was their primary point of contact with  
20 HOTWORX, and that she communicated with them on the phone in late 2020 numerous times  
21 until they closed the agreement. (*See* Dkt. No. 32 at 15.) She allegedly made representations  
22 about the costs of leasehold improvements and what financial performance was “achievable.”  
23 (*Id.* at 15–17.) Plaintiffs claim Gattuso also discouraged them from hiring an attorney, saying it  
24

would be a “waste of money” because of the “take it or leave it” nature of the franchise contract. (*Id.* at 10.) Defendants do not contest that Gattuso had phone conversation(s) with Plaintiffs regarding the franchise agreement, but summarily state that “[t]he alleged statements fail to establish sufficient minimum contacts with Washington for the Court to exercise personal jurisdiction” over her. (Dkt. No. 70 at 10.) Rather, they claim that “Ms. Gattuso’s interactions with Washington are limited to a few occasions of speaking with potential franchisees in Washington over the past four years, none of which required Ms. Gattuso to travel to the State of Washington.” (*Id.*) Ms. Gattuso has entered a declaration in which she attests that she does not reside in Washington, has never been to Washington for business purposes, and does not own property in Washington. (Dkt. No. 71-1 at 161–62.) She also asserts under oath that “I have not consented to jurisdiction in the State of Washington,” (*Id.* at 162) which, as discussed below, is clearly false and is directly contradicted by evidence in the record.

It is undisputed that Ms. Gattuso is (or was in the relevant time period) a registered Franchise Broker in the State of Washington. (Dkt. No. 70 at 11.) In applying to become a Franchise Broker, Ms. Gattuso signed a registration document that included the following attestation:

The applicant hereby irrevocably appoints the Securities Administrator as its agent for service of process upon whom may be served any notice, process or pleading in any action or proceeding against it arising out of, or in connection with, the sale of franchises and the undersigned **does hereby consent that any such action or proceeding against it may be commenced in any court of competent jurisdiction and proper venue within the State of Washington** by service of process upon the Securities Administrator with the same effect as if the undersigned was organized or created under the laws of the State of Washington and have been served lawfully with process in this state.<sup>2</sup>

---

<sup>2</sup> Per the terms of the registration form, an “applicant” can be either an individual or a corporate entity. (Dkt. No. 36 at 8.) Here, Ms. Gattuso applied for registration in her own name. (*Id.*)

1 (Dkt. No. 36 at 10) (emphasis added).

2 Ms. Gattuso’s registration was effective at least as early as March 19, 2020, and she  
3 signed renewal applications on November 11, 2020 and January 4, 2021. (*Id.* at 5–11.) Further,  
4 Defendant Stephen Smith, acting on behalf of HOTWORX, designated Gattuso as a Franchise  
5 Broker authorized to “represent and act on behalf of the Franchisor in the offer or sale of  
6 franchises” in the State of Washington. (Dkt. No. 36 at 32.) Defendants argue that Ms. Gattuso  
7 (and Ms. Price) signed the Franchise Broker agreement in their corporate capacities and so “the  
8 forms only show that HOTWORX consented to Washington’s jurisdiction,” (Dkt. No. 86 at 6),  
9 but that is belied by the registration document itself, which states that it is a registration for an  
10 “individual.” (Dkt. No. 36 at 8.).

11 Based on these facts, the Court easily concludes that Ms. Gattuso is subject to personal  
12 jurisdiction in this matter. Ms. Gattuso purposefully directed her business activities to the forum  
13 state by signing the Franchise Broker registration and proceeding to conduct franchise business  
14 in Washington. This claim arises from those forum-related franchise activities. Defendants’  
15 contrary statement that “[t]here is no evidence that Ms. Gattuso’s attenuated communications  
16 were forum-related” is contradicted by their own evidence that she managed the Skistimas  
17 account and sent the FDD to Plaintiffs. (*Compare* Dkt. No. 70 at 11 *with* Dkt. No. 45 at 151,  
18 155.) And Defendants cannot be heard to argue that exercising jurisdiction over Ms. Gattuso  
19 would “not comport with traditional notions of fair play” and would be “unreasonable” (Dkt. No.  
20 70 at 11) when she *expressly consented* to jurisdiction in the State of Washington for claims  
21 arising out of franchise-related transactions by signing the Franchise Broker agreement.  
22 Defendants’ motion to dismiss Ms. Gattuso from this suit for lack of jurisdiction is denied.

23 ii. Nancy Price  
24

1 Although Ms. Price's involvement in this matter was less extensive than that of Ms.  
2 Gattuso, the Court similarly concludes that Ms. Price is subject to personal jurisdiction.  
3 Plaintiffs allege that Ms. Price participated in at least one of the conversations between them and  
4 Ms. Gattuso, that in doing so Ms. Price enhanced Ms. Gattuso's credibility, and that they relied  
5 on Ms. Price's statements. (Dkt. No. 32 at 17–18.) Defendants do not appear to contest that Ms.  
6 Price participated in a sales-related conversation with Plaintiffs, though they note that Plaintiffs  
7 fail to provide details about her purported statements, and in any event describe the call as an  
8 “alleged isolated communication.” (Dkt. No. 70 at 12–13.) Ms. Price executed a declaration  
9 nearly identical to that of Ms. Gattuso disclaiming contacts with Washington, and it includes the  
10 same sworn statement that “I have not consented to jurisdiction in the State of Washington”  
11 (Dkt. No. 71-1 at 159), which again is clearly false and directly contradicted by evidence.

12 Like Ms. Gattuso, Ms. Price is a registered Franchise Broker in Washington. Her  
13 registration was effective at least as far back as December 31, 2019, and she signed renewals on  
14 February 18, 2020 and January 27, 2021. (Dkt. No. 36 at 12–21.) As part of those renewals, Ms.  
15 Price signed the same attestation that with respect to “any action or proceeding against [the  
16 applicant] arising out of, or in connection with, the sale of franchises” she “does hereby consent  
17 that any such action or proceeding against [the applicant] may be commenced in any court of  
18 competent jurisdiction and proper venue within the State of Washington.” (*Id.* at 15). She too  
19 was appointed to represent HOTWORX as a Franchise Broker in Washington. (*Id.* at 33.)

20 Accordingly, the Court finds that Ms. Price is subject to personal jurisdiction in  
21 Washington for this lawsuit. She purposefully availed herself of the forum by executing the  
22 Franchise Broker application and then conducting franchise-sale related activities in Washington.  
23 The claim arises out of those contacts. And it would not be unfair or unreasonable to require her  
24



1 to answer to a complaint in Washington when she consented to jurisdiction here for franchise-  
2 related litigation. For those reasons, Defendant’s motion to dismiss Ms. Price for lack of  
3 jurisdiction is denied.

4                   iii. Stephen P. Smith

5           Stephen P. Smith is the CEO of HOTWORX. Plaintiffs allege that Mr. Smith “spoke  
6 with Plaintiffs via video conference on or about December 29, 2020” and during that  
7 conversation he “reinforced everything that Ms. Gattuso and Ms. Price had said and enhanced  
8 their credibility.” (Dkt. No. 32 at 18.) Plaintiffs provided documentation showing that Mr.  
9 Smith, in his capacity as CEO, signed documents registering HOTWORX as a franchise in  
10 Washington, and appointing Ms. Gattuso and Ms. Price as franchise brokers. (Dkt. No. 36 at 22–  
11 28, 32–33.) He executed a “Uniform Franchise Consent to Service of Process” in which he  
12 consented for HOTWORX to be sued in Washington and elsewhere, and designated a  
13 representative in Louisiana to accept process. (*Id.* at 31.) Plaintiffs do not allege that Mr. Smith  
14 is a registered Franchise Broker himself. Like the other individual defendants, Mr. Smith  
15 executed an affidavit disclaiming contacts with Washington. (*See* Dkt. 171 at 155–56.)

16           Plaintiffs argue that jurisdiction can be imputed to Mr. Smith (and the other individual  
17 defendants) by operation of the Washington Franchise Investment Protection Act (“FIPA”).

18 Wash. Rev. Code 19.100 *et seq.* FIPA provides that:

19           Any person who is engaged or hereafter engaged directly or indirectly in the sale  
20 or offer to sell a franchise or a subfranchise or in business dealings concerning a  
21 franchise, either in person or in any other form of communication, shall be subject  
22 to the provisions of this chapter, shall be amenable to the jurisdiction of the courts  
of this state and shall be amenable to the service of process under RCW 4.28.180,  
4.28.185, and 19.86.160.

23 Wash. Rev. Code Ann. § 19.100.160 (West).

1 The act defines “person” to include:

2 [A] natural person, corporation, partnership, trust, or other entity and in the case  
3 of an entity, it shall include any other entity which has a majority interest in such  
4 an entity or effectively controls such other entity as well as the individual officers,  
directors, and other persons in act of control of the activities of each such entity.

5 Wash. Rev. Code Ann. § 19.100.010 (West).

6 Plaintiffs argue “FIPA pierces any corporate veil as to any ‘persons,’” citing these  
7 provisions. (Dkt. No. 80 at 5.)

8 Plaintiffs seem to present FIPA as an alternative to traditional jurisdiction principles, but  
9 the analysis runs the other direction: if Mr. Smith comes within the ambit of FIPA, the Court  
10 proceeds to assess whether exercise of jurisdiction would comport with due process. *See Garrett*  
11 *Tr. for estate of Taylor v. Rothschild*, No. C18-5863 BHS, 2019 WL 1957929, at \*4 (W.D.  
12 Wash. May 2, 2019) (conducting due process analysis *after* determining that defendant fell  
13 within FIPA). The statutory interpretation question is easy; Mr. Smith, as CEO, is an officer of  
14 HOTWORX, a franchisor, so he falls within the FIPA. The due process question is harder.

15 As an initial matter, the Court rejects Plaintiffs’ premise that filing HOTWORX’s  
16 corporate registration forms can be imputed to Mr. Smith personally for purposes of a minimum  
17 contacts analysis. Rather, the Ninth Circuit has specifically rejected the idea that a CEO’s  
18 signature on behalf of a company establishes personal jurisdiction, instead stating that each  
19 “party’s ‘contacts with the forum [s]tate must be assessed individually.’” *In re Boon Glob. Ltd.*,  
20 923 F.3d 643, 650–51 (9th Cir. 2019) (quoting *Calder*, 465 U.S. at 790). The Washington Court  
21 of Appeals has also instructed that a jurisdiction analysis for corporate officers under FIPA must  
22 be based on “individual activities.” *Huebner v. Sales Promotion, Inc.*, 684 P.2d 752, 757 (Wash.  
23 App. 1984).

1 Therefore, the Court focuses its attention on the one action that Plaintiffs attribute to Mr.  
2 Smith personally: a videocall in which Mr. Smith helped sell the franchise to Plaintiffs and  
3 “reinforced” the allegedly fraudulent statements made by HOTWORX employees. Defendants  
4 argue that “one lone, vague conversation” is insufficient to establish personal jurisdiction. (Dkt.  
5 No. 70 at 13.) In the Court’s view, the videocall is not so easily dismissed. Rather, the Ninth  
6 Circuit has cautioned that “[i]t is the quality of these contacts, however, and not the quantity, that  
7 confers personal jurisdiction over a defendant.” *Brainerd v. Governors of the Univ. of Alberta*,  
8 873 F.2d 1257, 1259 (9th Cir. 1989).

9 *Brainerd* is instructive. In that case, Plaintiff Brainerd sued Defendant Meekison, a Vice  
10 President at the University of Alberta, alleging that during a phone call Meekison received from  
11 a counterpart at the University of Arizona, Meekison disparaged Brainerd—violating a  
12 separation agreement Brainerd had with the University of Alberta and negatively impacting his  
13 offer of employment in Arizona. *See id.* at 1258. The Ninth Circuit held that the phone call, the  
14 contents of which were disputed, was sufficient to establish jurisdiction over Meekison in  
15 Arizona. *Id.* at 1259–60. Even though Meekison did not initiate the call, accepting the  
16 allegations in the complaint as true, Meekison directed his tortious communications into Arizona  
17 and knew that their harm would occur there. *Id.* at 1259. That was enough for jurisdiction to  
18 attach, and for the exercise of jurisdiction to be reasonable. *See id.* at 1259–60 (“where acts are  
19 performed for the very purpose of having their consequences felt in the forum state, the forum  
20 will have personal jurisdiction over the actor”); *see also Burri Law*, 35 F.4th 1207 (applying  
21 *Brainerd* and finding jurisdiction proper in Arizona based on communications from out of state).

22 Washington courts’ evaluation of the reach of personal jurisdiction under FIPA also  
23 controls. *See Sinatra*, 854 F.2d at 1194. In *Huebner*, 684 P.2d 752, the Washington Court of  
24

1 Appeals held that extending jurisdiction to the President and Vice President of a franchisor under  
2 FIPA did not violate due process. The court found that one of the individual defendants “was  
3 responsible for the advertisements in Washington” that led the Plaintiff to sign the franchise  
4 agreement, and the other merely “contacted” the Plaintiff “and other Washington residents”  
5 regarding franchises. *Id.* at 756. The court was unmoved by the President’s statement that he  
6 had never been to Washington and effort to “liken[] himself to an office secretary who merely  
7 corresponds occasionally with out of state residents by telephone and mail,” instead focusing on  
8 his conduct directed at the forum. *Id.* (citing *Calder*). The basis for jurisdiction in this case is  
9 nearly the same.

10 For those reasons, the motion to dismiss Defendant Smith for lack of personal jurisdiction  
11 is denied.

#### 12 IV MOTION TO COMPEL

13 Because the Court is satisfied that it has jurisdiction over the individual defendants, and  
14 jurisdiction as to the corporate defendant is unchallenged, the Court proceeds to consider  
15 Defendants’ Motion to Compel. (Dkt. No. 87). Defendants’ motion is styled as a “Motion to  
16 Compel Compliance with Contractual Dispute Resolution Procedures.” (*Id.*) Defendants ask  
17 this Court to dismiss this case under Federal Rule of Civil Procedure 12(b)(6) for failure to  
18 comply with these contractual dispute resolution processes and to compel compliance, or in the  
19 alternative, to stay the case and compel compliance, “up to and including” arbitration. (*Id.* at  
20 23.) The Court construes this as an alternative request to compel arbitration. (*See id.* at 13,  
21 asking the Court to “enforce the arbitration agreements under §§ 3 and 4 of the FAA, leaving  
22 Plaintiffs’ challenges to be determined by the arbitrator.”). Plaintiffs treat this entire dispute  
23 process as a singular Arbitration Clause and argue that the one-sidedness and open-ended  
24

timelines of the dispute resolution process is a reason this Court should hold the Arbitration Clause unconscionable. (*See* Dkt. No. 89 at 11–14.) The Court holds that under the terms of the contract, “any dispute” is subject to arbitration, including a dispute about the pre-arbitration process. The Court thus grants Defendants their alternative requested relief and compels the parties to arbitration.

#### A. Dispute Resolution Process

Defendants seek to have this Court order enforcement of the FDD’s dispute resolution clauses, which provide a three-step process: first, claimants must submit to an internal dispute resolution process, in which they (and their attorney) would meet with a corporate representative via videocall. (Dkt. No. 87 at 5.) Next, and at the Franchisor’s discretion, claims are submitted to mediation. (*Id.* at 5–6.) Finally, if those processes fail, and again at the Franchisor’s option, claims proceed to arbitration. (*Id.* at 6–7.) In relevant part, the three-step dispute resolution process is as follows:

25.2 Internal Dispute Resolution. Before commencing any legal action against Franchisor or its Affiliates with respect to any such claim or dispute, you must submit a notice of dispute which specifies, in detail, the precise nature and grounds of such claim or dispute to Franchisor. If your claim or dispute cannot be resolved, you must agree to a face-to-face meeting between you, your attorney if you have retained one, a corporate representative from Franchisor and the Franchisor’s counsel prior to engaging in mediation. This meeting may occur via Skype or another virtual face-to-face platform. You must exhaust these internal dispute resolution procedures before proceeding to mediation.

25.3 Mediation. In the event any claim or dispute is not resolved under Section 25.2 and at Franchisor's option, all claims or disputes between you and Franchisor or its Affiliates arising out of, or in any way relating to, this Agreement, or any of the parties' respective rights and obligations arising out of this Agreement, shall be submitted first to mediation, in Jefferson Parish, Louisiana. The parties shall equally share the costs of mediator’s fees. Franchisor may elect to establish a Peer Compliance Committee (PCC) to review certain claims Franchisor or you may make against each other

25.4 Arbitration. At Franchisor’s option, all disputes and claims relating to this Agreement or any ancillary agreement entered into between the parties, the rights and obligations of the parties, or any other claims or causes of action relating to the making, interpretation, or performance of either party under this Agreement, shall be settled by arbitration in Jefferson Parish, Louisiana in accordance with the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association. [Sections regarding limitations period and attorneys’ fees omitted, see *infra*.]

(Dkt. No. 88 at 28–29).<sup>3</sup>

Defendants argue that in enforcing this dispute resolution process, this Court should follow the example of *Two Guys, Inc v. Nick-N-Willy’s Franchise Co.*, LLC, No. C11-5537BHS, 2011 WL 4596692 (W.D. Wash. Oct. 3, 2011); (*See* Dkt. No. 87 at 11). In that case, the court granted a Rule 12(b)(6) motion and compelled mediation against franchisees, because the franchisees did not plead that they participated in contractually required mediation. *Id.* Plaintiff argues this case is inapposite because it did not involve a challenge to the validity of an arbitration clause. (Dkt. No. 89 at 23–24.) In their reply (Dkt. No. 91 at 3), Defendants also cite *LoanCraft, LLC v. First Choice Loan Services, Inc.*, No. 12-10138, 2012 WL 628617 at \*1 (E.D. Mich. Feb. 27, 2012), in which the court granted a motion to dismiss for failure to follow a dispute process. That process started with internal “informal means,” and, if thirty days had elapsed without resolution, “a mutually agreed non-binding alternative dispute resolution technique.” *Id.* If those steps failed, either party could seek judicial resolution. *Id.*

These cases are distinguishable because they do not involve a dispute resolution process being used as a gateway to arbitration. Further, *LoanCraft* involved a time-limited dispute

---

<sup>3</sup> The parties also signed an Area Development Agreement (“ADD”) which contains a parallel dispute resolution process clause. (*See* Dkt. 88 at 61.) The dispute resolution process terms in the ADD are nearly the same, though it omits reference to a “Peer Compliance Committee” under the mediation section, and it makes more explicit that arbitration is to take place only after the preceding steps have failed, “and at HOTWORX®’s sole discretion.” (*Id.*)

1 resolution process, after which the contract provided for mutually agreed dispute resolution, or  
2 judicial review. *Id.* Defendants’ cases thus do not address Plaintiffs’ argument that the dispute  
3 resolution process is unenforceable because it is indeterminate in length and leaves access to  
4 arbitration at Defendants’ sole discretion, citing *Steven Burnett v. Pagliacci Pizza, Inc*, 442 P.3d  
5 1267 (Wash. Ct. App. 2019). (*See* Dkt. No. 89 at 14). In that case, the Washington Court of  
6 Appeals invalidated an internal dispute process (referred to as “F.A.I.R.”) that prohibited  
7 arbitration unless the process was completed. 442 P.3d at 1269–70. Because the F.A.I.R. policy  
8 “makes no commitment to address disputes or schedule nonbinding conciliation within a  
9 specified period,” putting the time for compliance beyond “the employee’s control” and included  
10 no “release valve” allowing arbitration if an unreasonable amount of time had elapsed (or if the  
11 limitations period would expire), it provided the defendant with “unfair advantages” and was  
12 unconscionable. *Id.* at 1279.

13 Ultimately, the Court does not rule on enforceability of the dispute resolution process,  
14 because the text of the contract delegates “all disputes and claims relating to this Agreement or  
15 any ancillary agreement entered into between the parties” to the arbitrator. (Dkt. No. 88 at 29.)  
16 The parties dispute whether internal dispute resolution and/or mediation is required under the  
17 contract or appropriate under the circumstances, and that dispute itself is a “dispute[] and claim[]  
18 relating to [the Parties’] Agreement” to be decided by an arbitrator. Further, as discussed below,  
19 the Court agrees with Defendants that under Ninth Circuit caselaw, incorporation of the  
20 American Arbitration Association (“AAA”) rules delegates arbitrability disputes to the arbitrator.  
21 Accordingly, the Court proceeds to consider Defendants’ alternative request for relief,  
22 compelling arbitration.

## 23 **B. Arbitration Clause**

Defendants seek an order compelling Plaintiffs to arbitration, and Plaintiffs oppose on the grounds that the Arbitration Clause is unconscionable. (*See* Dkt. Nos. 87 at 23; 89.) Courts analyze unconscionability challenges to arbitration clauses in different manners depending on whether the challenge is to the entire contract, or solely to the arbitration clause. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010). Similarly, a challenge can be to procedural or substantive unfairness of the arbitration clause, or both. *Id.* at 73–74. Here, Plaintiffs clarify that they are challenging only the Arbitration Clause itself, not the entire contract. (Dkt. No. 89 at 8.) And while they recite the legal standard for a procedural challenge (*see id.* at 9), their challenge focuses on the alleged substantive unconscionability of the Arbitration Clause. (*Id.* at 8–20.) Plaintiffs articulate five principal reasons that the Arbitration Clause is unconscionable:<sup>4</sup>

- 1) It provides that Louisiana law is the governing law for the contract and the venue for disputes in violation of FIPA (*see* Dkt. No. 89 at 9–11);
- 2) The internal dispute resolution process and mediation provision are one-sided (*id.* at 11–14);
- 3) It shortens the limitations period for claims, in violation of FIPA (*id.* at 14–18);
- 4) It deprives Plaintiffs of the right to punitive or exemplary damages, in violation of FIPA, and (*id.* at 18–19);
- 5) It requires Plaintiff to pay attorneys fees if Defendant prevails but not the reverse, in violation of FIPA (*id.* at 19–20).

---

<sup>4</sup> Plaintiffs have named other aspects of the FDD they argue are unconscionable: that the contract applies arbitration to claims against the Franchisor’s officers, but not to claims against Franchisees, that only the Franchisor can seek injunctive relief, that only the Franchisor does not waive strict compliance by course of performance, and that only Franchisees are subject to personal liability. (*See* Dkt. No. 32 at 8–9.) But since Plaintiffs focus their argument on these five principal deficiencies, the Court does so as well.



1 The corresponding clauses of the contract (other than the internal dispute resolution and  
2 mediation clauses, already discussed *supra*), provide as follows:

3 25.1 Governing Law. This Agreement shall be deemed to have been made in the  
4 State of Louisiana and shall be construed according to the laws of Louisiana  
5 without regard to its conflict of laws, La. Civ. Code Arts. 3515 et seq., and any  
6 amendments and/or revisions thereto.

7 ...

8 25.4 Arbitration At Franchisor's option, all disputes and claims relating to this  
9 Agreement or any ancillary agreement entered into between the parties, the rights  
10 and obligations of the parties, or any other claims or causes of action relating to  
11 the making, interpretation, or performance of either party under this Agreement,  
12 shall be settled by arbitration in Jefferson Parish, Louisiana in accordance with  
13 the Federal Arbitration Act and the Commercial Arbitration Rules of the  
14 American Arbitration Association. Any arbitration proceeding, or any claim in  
15 arbitration (including any defense and any claim of setoff or recoupment), must  
16 be brought or asserted before the expiration of the earlier of (1) the time period  
17 for bringing an action under any applicable state or federal statute of limitation;  
18 (2) 1 year after the date upon which a party discovered or should have discovered,  
19 the facts giving rise to an alleged claim; or (3) 2 years after the first act or  
20 omission giving rise to an alleged claim. Claims of Franchisor attributable to the  
21 underreporting of sales and claims of the parties for indemnification shall be  
22 subject only to the applicable state or federal statute of limitation.<sup>5</sup>

23 ...

24 25.9 Waiver of Punitive Damages. You waive to the fullest extent permitted by  
law, any right to or claim for any punitive, exemplary, incidental, indirect, special  
or consequential damages (including, without limitation, lost profits) which you  
the parties may have against Franchisor, its Affiliates, successors or assigns,  
arising out of any cause whatsoever (whether such cause be based in contract,  
negligence, strict liability, other tort or otherwise) and agree that in the event of a  
dispute, recovery shall be limited to actual damages. If any other term of this  
Agreement is found or determined to be unconscionable or unenforceable for any  
reason, this provision shall continue in full force and effect, including, without  
limitation, the waiver of any right to claim any consequential damages.

---

<sup>5</sup> Clause 25.5 of the FDD provides: "Third-Party Beneficiaries. Franchisor's officers, directors, shareholders, agents, employees and/or Affiliates are express third-party beneficiaries of this Agreement and the mediation and arbitration provisions contained herein, each having authority to specifically enforce the right to mediate and arbitrate claims asserted against such person(s) by you." (Dkt. No. 88 at 29.) Thus, the claims against the individual defendants are also presumptively subject to arbitration.

...

25.11 Attorneys' Fees. If either party institutes any judicial or arbitration proceeding to enforce any obligations under or to interpret the terms of this Agreement and Franchisor prevails in the action or proceeding, you shall be liable to Franchisor for all costs, including reasonable Attorneys' fees, incurred in connection with such proceeding.<sup>6</sup>

(Dkt. No. 88 at 28–30.)

Before the court can consider unconscionability at all, however, there is a threshold question of who makes the determination of arbitrability: the Court or the arbitrator. Defendants argue that the FDD delegates any questions of arbitrability to the arbitrator by incorporating the rules of the American Arbitration Association (“AAA”). (Dkt. No. 87 at 14–17.) Plaintiffs disagree. (Dkt. No. 89 at 24.) There is also a question as to whether several provisions of the Arbitration Clause that Plaintiffs challenge as unconscionable are in effect in this contract at all; Defendants argue that these provisions are superseded by the “Washington Addendum” to the FDD. (Dkt. Nos. 87 at 20–22; 91 at 7–12.) Plaintiffs dispute that the Washington Addendum was properly incorporated into the contract. (Dkt. Nos. 89 at 23; 32 at 10–11.)

As explained below, the Court agrees with Defendants that binding Ninth Circuit caselaw holds that incorporation of the AAA rules is sufficient to delegate arbitrability to the arbitrator. In the alternative, the Court finds that the Washington Addendum was incorporated into the contract between the parties, and it obviates or narrows the claimed bases of unconscionability. Thus, the Court grants Defendants' alternative motion to compel arbitration.

i. Delegation Clause

---

<sup>6</sup> Subpart 25.4.2 of the Arbitration section also provides “[i]f Franchisor is the prevailing party, the arbitrator's award shall include all fees, costs and attorneys' fees, notwithstanding the foregoing.” (Dkt. No. 88 at 29.)

1 Typically, when a party challenges an arbitration clause in a contract, “the federal court  
2 must consider the challenge before ordering compliance with the agreement under § 4” of the  
3 Federal Arbitration Act (“FAA”). *Rent-A-Center*, 561 U.S. at 71. But when the parties instead  
4 agree by contract that the arbitrator will rule on gateway questions of arbitrability, courts are  
5 bound to give effect to that “delegation” clause, unless a party challenges the delegation  
6 specifically. *Id.* at 71–4. Here, Defendants argue that the contract contains a delegation clause,  
7 and that Plaintiffs fail to challenge it specifically. (*See* Dkt. No. 87 at 14–17.) The Court agrees.

8 The language of the FDD on its face does not reference delegation. Despite the lack of  
9 an explicit delegation clause, Defendants argue that under Ninth Circuit caselaw, incorporating  
10 the Commercial Arbitration Rules of the American Arbitration Association is sufficient to  
11 delegate arbitrability to the arbitrator. (Dkt. No. 87 at 14–15.) In *Brennan v. Opus Bank*, 796  
12 F.3d 1125, 1130 (9th Cir. 2015), the Ninth Circuit unambiguously held “that incorporation of the  
13 AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to  
14 arbitrate arbitrability.” The key language in the AAA rules is that the “arbitrator shall have the  
15 power to rule on his or her own jurisdiction, including any objections with respect to  
16 the . . . validity of the arbitration agreement.” *Id.* The court went onto note that it was dealing  
17 with a commercial dispute involving sophisticated parties, but that the same rule may apply in  
18 other contexts. *Id.* at 1130–31. More recently, in *Caremark, LLC v. Chickasaw Nation*, 43 F.4th  
19 1021, 1031 (9th Cir. 2022), the court reaffirmed this rule. The court held that a pharmacy  
20 services contract (the “Provider Agreement”) between Caremark and the Chickasaw Nation  
21 included a delegation clause because the AAA rules were incorporated in a Provider Manual,  
22 which in turn was incorporated in the Provider Agreement. *Id.* Prior to 2014 the Provider  
23  
24

1 Manual merely incorporated the AAA rules, and post-2014 it included an explicit delegation  
2 clause, but the court noted that under *Brennan*, incorporation of the rules was sufficient. *See id.*

3 Plaintiffs have no response to this line of cases. They argue that the Arbitration Clause  
4 contains no explicit delegation clause, ignoring the issue of AAA rules entirely. (*See* Dkt. No.  
5 89 at 24.) To the extent it exists, Plaintiffs do not challenge the validity of a delegation clause  
6 specifically; they argue it is unconscionable for the same reasons the remainder of the arbitration  
7 clause is unconscionable—that they cannot access arbitration other than at the sole discretion of  
8 Defendants. (*See id.*)

9 The Court notes that Defendants have not provided the exact delegation language  
10 contained in the AAA Commercial Arbitration Rules in effect at the time of contract formation.  
11 Nonetheless, the Court cannot ignore the unmistakable directive of the Ninth Circuit that  
12 incorporation of the AAA rules is sufficient for delegation, especially without responsive  
13 argument by Plaintiffs. Accordingly, the Court holds that the contract does delegate arbitrability  
14 to the arbitrator.

15 ii. Washington Addendum

16 In the alternative, even if delegation did not apply, the text of the Washington Addendum  
17 takes some of the alleged bases of unconscionability out of play entirely, while others are  
18 diminished or arguably resolved.

19 First, the Court considers if the Washington Addendum was properly incorporated into  
20 the contract. Plaintiff argues Defendant has only “belatedly” embraced the Washington  
21 Addendum and claims it was “omitted” from the contract. (*See* Dkt. No. 89 at 23.) Plaintiffs  
22 claim they were not aware of this addendum until 2022 or 2023. (*See* Dkt. No. 32 at 10–11.)  
23 This argument is without merit. Plaintiffs signed and initialed “Exhibit K” “Item 23” of the  
24

FDD, entitled “Receipt” in which they acknowledge receiving a list of exhibits to the FDD, including “Exhibit J – State Specific Addenda.” (Dkt. No. 88 at 56–57.)<sup>7</sup> Plaintiffs signed the FDD on December 29, 2020. (See Dkt. No. 88 at 68.) The Receipt indicates that Plaintiffs were on notice of the state addenda and incorporates them into the FDD. See *Satomi Owners Ass’n v. Satomi, LLC*, 225 P.3d 213, 225 (Wash. 2009) (“If the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract.”). Further, Washington Administrative Code 460-80-305 requires that a FIPA addendum be included in a “franchise agreement *or* Franchise Disclosure Document” (emphasis added)—here the addendum was not attached to the franchise agreement but was included in the FDD. (See Dkt. No. 70 at 21.) Thus, the Washington Addendum applies to this dispute. The text of the Addendum provides, in relevant part:

This Amendment shall pertain to franchises sold in the State of Washington and shall be for the purpose of complying with the Washington Franchise Investment Protection Act (“WFIPA”), codified at Wash Rev. Code 19.100.010 et seq., and accompanying regulations.

1. In the event of a conflict of laws, the WFIPA provisions will govern.

2. RCW 19.100.180 may supersede the franchise agreement in your relationship with the franchisor including the areas of termination and renewal of your franchise. There may also be court decisions which may supersede the franchise agreement in your relationship with the franchisor including the areas of termination and renewal of your franchise.

---

<sup>7</sup> The Washington Addendum itself contains a signature line that is unsigned. (See Dkt. No. 88 at 306.) That does not make incorporation via the Receipt ineffective. See *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 7 P.3d 861, 494 (Wash. Ct. App. 2000) (“Incorporation by reference allows the parties to ‘incorporate contractual terms by reference to a separate ... agreement to which they are not parties, and including a separate document which is unsigned.’”); *Stuebe v. S.S. Indus., LLC*, No. C17-5814 BHS, 2018 WL 3496614, at \*2 (W.D. Wash. July 20, 2018) (“It is well settled that terms of another unread, unsigned agreement can be incorporated by reference so long as the unsigned document is identified and readily available for inspection.”).

1 3. In any arbitration or mediation involving a franchise purchased in the State of  
 2 Washington, the arbitration or mediation site will be either in the State of  
 3 Washington, or in a place mutually agreed upon at the time of the arbitration or  
 4 mediation, or as determined by the arbitrator or mediator at the time of arbitration  
 or mediation. In addition, if litigation is not precluded by the franchise agreement,  
 a franchisee may bring an action or proceeding arising out of or in connection  
 with the sale of franchises, or a violation of WFIPA, in Washington.

5 4. A release or waiver of rights executed by the Franchisee may not include rights  
 6 under the WFIPA or any rule or order thereunder except when executed pursuant  
 7 to a negotiated settlement after the agreement is in effect and where the parties are  
 8 represented by independent counsel. Provisions such as those which unreasonably  
 restrict or limit statutes of limitations period for claims under the Act, or rights or  
 remedies under the Act such as the right to a jury trial, may not be enforceable.<sup>8</sup>

9 (Dkt. No. 88 at 305–06.)

10 As to Plaintiffs’ claim that the contract is unconscionable because Louisiana law governs,  
 11 that concern is obviated by Paragraph 1, which states that if there is a conflict between FIPA and  
 12 other law, FIPA governs. FIPA itself prohibits waiving compliance with its requirements via a  
 13 choice of law provision or other agreement. Wash. Rev. Code § 19.100.220. Further, Paragraph  
 14 3 removes any concern that Plaintiffs would be forced to travel to Louisiana to mediate or  
 15 arbitrate their claims. As to Plaintiffs’ objection to the limitations period provision of the FDD,  
 16 Paragraph 4 provides that “[p]rovisions such as those which unreasonably restrict or limit  
 17 statutes of limitations period for claims under the Act, or rights or remedies under the Act such  
 18 as the right to a jury trial, may not be enforceable.” Plaintiffs worry that use of the word “may”  
 19 makes this clause non-binding for Defendants (*see* Dkt. No. 89 at 23), but Defendants accept that  
 20 the Washington Addendum supersedes the FDD’s period of limitations. (*See* Dkt. No. 91 at 9–

---

21 <sup>8</sup> Plaintiffs offer no argument that the provision in Paragraph 4 of the Addendum referencing the  
 22 “right to a jury trial” requires a jury trial here, and do not cite any provision of FIPA  
 23 guaranteeing such a right. Further, Paragraph 3 contemplates arbitration in Washington, unless  
 24 “litigation is not precluded by the franchise agreement”—and Plaintiffs do not argue that  
 franchise agreement itself allows litigation. Nonetheless, Plaintiffs are free to argue to an  
 arbitrator that there is a statutory or contractual right to a jury trial.

10; *see also* Dkt. No. 87 at 20–21, citing Wash. Rev. Code §§ 4.16.080(4), 4.16.130.) Thus, there is no live dispute about enforcing a shorter limitations period. Likewise, Paragraph 4’s reservation of “rights and remedies” guaranteed by the Act preserves Plaintiffs’ access to damages they may seek to recover by statute, including attorney’s fees and costs, under Washington Revised Code § 19.100.190.

The Court does not undertake a full analysis of the enforceability of each element of the contract under FIPA, because ultimately it will be up to the arbitrator to determine how to reconcile the contract and FIPA to the facts of this case. Where four of the five principal bases for asserting unconscionability are eliminated because of the Washington Addendum, the Court cannot grant Plaintiffs’ request to invalidate the arbitration clause in its entirety. As to the remaining principal basis for finding unconscionability, it relates to the applicability and enforceability of the internal dispute resolution process and the mediation provision—a dispute subject to arbitration.

### C. Stay or Dismissal


Defendant asks that this Court dismiss this action after compelling arbitration, or in the alternative, stay the case. (*See* Dkt. 87 at 2.) Until recently, courts in the Ninth Circuit used their discretion to decide whether to stay or dismiss a case pending arbitration, applying *Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). However, the Supreme Court overruled *Sparling* in *Smith v. Spizzirri*, 601 U.S. 472, 475–77 (2024), holding that if a party requests a stay pending arbitration under 9 U.S.C. § 3, a stay rather than dismissal is mandatory under the text of the statute. The Court also articulated prudential reasons for stay over dismissal: the FAA does not intend for orders compelling arbitration to be immediately appealable, unlike a dismissal, but does intend for courts to play a supervisory role as the arbitration is pending. *Id.*

1 at 478. Accordingly, the Court will grant Defendants' alternative request, and stay this case  
2 pending arbitration.

3 **V CONCLUSION**

4 For the reasons stated above, Defendants' Motion to Dismiss (Dkt. No. 70) is DENIED  
5 as to lack of jurisdiction, and the Court does not reach the merits of Defendants' other defenses  
6 for failure to state a claim. Defendants' Motion to Compel (Dkt. No. 87) is GRANTED, to the  
7 extent it seeks an order compelling arbitration. Pursuant to 9 U.S.C. §§ 3–4, the Court ORDERS  
8 the parties to proceed to arbitration and STAYS this case.

9 Dated this 22nd day of October, 2024.

10   
11 \_\_\_\_\_  
12 David G. Estudillo  
13 United States District Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24